United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

75-7271

To be argued by
MARTIN R. GOLD

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

POLORON PRODUCTS, INC. (with substitution applied for by Dynamark Corporation, assignee),

Plaintiff-Appellant,

v.

LYBRAND ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand),

Defendant and Third-Party Plaintiff-Appellee,

v.

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION and GEORGE FEIWELL,

Third-Party Defendants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT POLORON PRODUCTS, INC.

GOLD, FARRELL & MARKS
Attorneys for Plaintiff-Appellant Poloron Products, Inc.
and Third-Party Defendants Dynamark Corporation,
Samuel Levitt, Carl Levitt, Jay Levitt and George Feiwell
595 Madison Avenue
New York, New York 10022

OF COUNSEL:
Martin R. Gold
Charles B. Ortner

(4833B)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This is an appeal from an order of Hon. William C. Conner, U.S.D.J., dated and filed April 3, 1975, which dismissed the amended complaint on the ground of res judicata pursuant to Rule 41(a)(1), Fed. R. Civ. P., the so-called "two-dismissal" rule.*

On May 27, 1975, plaintiff-appellant, Poloron Products, Inc. ("Poloron"), assigned its claim against defendant-appellee to Dynamark Corporation ("Dynamark"), as is more fully described below. Thereafter, defendant-appellee moved this Court to dismiss this appeal, and Dynamark made a motion to substitute it as the plaintiff-appellant. On the return date of those motions, the Court declined to decide either of them. Instead, the parties were directed to discuss the issues raised by the motions in the appeal briefs.

---

* Judge Conner also dismissed the counterclaims and third-party claims interposed by defendant-appellant without prejudice, finding that they lacked an independent basis for federal jurisdiction. This appeal does not concern these claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This case requires an interpretation of Rule 41(a)(1), which is printed in the margin, in relevant part.* Moreover, this Court must determine whether the assignment of the claim by Poloron to Dynamark renders this appeal moot, and whether Dynamark's motion to be substituted as the plaintiff-appellant should be granted.

1. Does the "two dismissal" rule contained in Rule 41(a)(1), Fed. R. Civ. P., act to extinguish a claim where the first dismissal was by stipulation signed by all parties, and the second dismissal was by unilateral notice by the plaintiff pursuant to Rule 41(a)(1)(i)?

---

* The relevant portions of Rule 41(a)(1) provide as follows:

> "(a) Voluntary Dismissal: Effect Thereof.
>
> (1) By Plaintiff; by Stipulation. . . . [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."

2. Does the "two dismissal" rule contained in Rule 41(a)(1), Fed. R. Civ. P., act to extinguish a claim where the plaintiff in the second lawsuit was not the plaintiff in the first?

3. Was the assignment to Dynamark of Poloron's claim against defendant-appellee invalid as being champertous, thereby rendering this appeal moot as a result of a release given to defendant-appellee by Poloron which expressly excepted these assigned claims?

STATEMENT OF THE CASE*

In October 1967, third-party defendants Carl Levitt, Jay Levitt and Samuel Levitt were the principals of Levitt Manufacturing Corporation ("LMC"), which manufactured lawn mowers. At that time, they entered into an agreement with Poloron to sell their stock in LMC, which represented complete control of the corporation, to Poloron. In exchange for their company, they received a modest sum of cash, consisting of $11,200. In addition, Poloron assumed personal guarantees of the Levitts, and

---

* The facts upon which the amended complaint are based are in dispute. Since the lower court dismissed the complaint without reaching any of the substantive issues, plaintiff's version of the facts is adopted for purposes of this statement.

paid an outstanding loan of $109,000 on which Samuel Levitt was personally liable. It was further agreed that the Levitts were to be compensated by receiving Poloron stock over the next several years in an amount to be valued as a percentage of corporate earnings. [156, 197-98, 218-19 A] *

At the request of all parties to the transaction, the accounting firm now known as Coopers & Lybrand ("Lybrand"), which had maintained the corporate books of LMC for several months, was also retained to conduct an audit of LMC's books and records. It was agreed, as Lybrand well knew, that the parties would rely upon the certified figures contained in the balance sheet prepared by Lybrand, and they so relied.[199, 202, 219-20 A]

It is important to note that LMS was a big business handling many accounts, and with very complicated and involved accounting procedures. As in many big businesses, the principals relied upon their accountants to advise them as to all aspects of the financial operations of their company, including assets and liabilities. These figures can vary greatly in a brief period of time in any large business. The Levitts relied upon the accountants, Lybrand, to provide them with an accurate statement of the financial circumstances of their company at the time of the

---

* References are to the Joint Appendix.

transaction. Because the Levitts had no reason to believe at the time that the audit was inaccurate, they gave Poloron their personal guarantees of the balance sheet prepared by Lybrand. [156-57, 165, 198-202 A]

After the sale, LMC's name was changed to Poloron Products of Indiana, Inc. ("Poloron-Indiana"). Following the consummation of the transaction, an audit of Poloron-Indiana was conducted by the accounting firm of Touche, Ross, Bailey & Smart. That audit revealed that the Lybrand balance sheet contained substantial errors, which overvalued LMC by $220,000. To compensate itself, Poloron-Indiana thereupon withheld approximately $220,000 in sales commissions which were otherwise due to Dynamark. [157-58, 167-68, 204-05 A]

In May 1970, Dynamark brought an action against Poloron-Indiana in the United States District Court for the Northern District of Indiana seeking recovery of the commissions, claiming they had been wrongfully withheld. Thereafter, however, it became evident that the real culprit was Lybrand, since whatever losses anyone had sustained were the result of the reliance placed on Lybrand's grossly insufficient audit. Accordingly, in September 1970, Dynamark obtained an order permitting the amendment of its complaint to include Lybrand as a

defendant. Upon the motion of Poloron-Indiana, that action was transferred to the United States District Court for the Southern District of New York. Thereafter, Judge Charles M. Metzner granted Dynamark's motion to amend the complaint to add the parent corporation, Poloron, as a defendant. [158-59, 205-6 A]

After a period of litigation in New York, Poloron, Poloron-Indiana and Dynamark entered into a settlement agreement. It had become clear that none of them or their principals should be held liable for the losses which had been sustained as a result of the deficient financial statements prepared by Lybrand, upon which everyone had relied. They agreed that the lawsuit would be terminated and that their respective rights would be assigned to a single party, Poloron, which would pursue the action against the only real wrongdoer, Lybrand. The settlement agreement provided that seventy-five percent of any ultimate recovery against Lybrand would belong to Dynamark, the party which had borne most of the losses by virtue of not having been paid certain commissions as a result of the offset claimed by Poloron-Indiana. Moreover, the parties agreed that upon the demand of Dynamark, and certain other conditions being met, Poloron would assign the entire claim to Dynamark. A stipulation of discontinuance, without prejudice, was signed by all parties

to the first action, including Lybrand, in June 1970. [159-60, 171-72, 185-88, 206, 213-217, 222 A]

Thereafter, pursuant to the settlement agreement, Poloron, as assignee of all rights against Lybrand, filed a complaint against Lybrand in the United States District Court for the Northern District of Illinois, Dynamark's principal place of business. [160 A] In January 1972, shortly after the action was filed, the United States Court of Appeals for the Seventh Circuit decided the case of Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972). That decision changed existing law in the Seventh Circuit concerning the statute of limitations for actions brought under Section 10(b) of the Securities Exchange Act of 1934, the section upon which the complaint was based. Prior to that decision, the Seventh Circuit had applied the five-year Illinois statute of limitations governing fraud actions to claims arising under Section 10(b). In Parrent, however, the Court decided, for the first time, that the applicable statute of limitations was the three-year Illinois securities law statute.

Upon learning of this decision, which would have terminated the plaintiff's right against Lybrand in the Seventh Circuit, Poloron filed a notice of dismissal of the action

under Rule 41(a)(1)(i), Fed. R. Civ. P., which permits such voluntary dismissal, without prejudice, before the filing of a responsive pleading. Thereafter, Poloron commenced an action against Lybrand based upon the same claims in the United States District Court for the Southern District of New York, where the applicable statute of limitations is six years. Lybrand answered the amended complaint in that action and made a motion, inter alia, to dismiss the amended complaint pursuant to the "two dismissal" rule of Rule 41(a)(1), Fed. R. Civ. P.* [161, 184 A] That motion was granted.

EVENTS SUBSEQUENT TO THE DECISION BY THE DISTRICT COURT

In April 1975, Poloron's general counsel and Lybrand's counsel entered into a settlement agreement on behalf of their clients [247-49A]]. On May 27, 1975, Poloron delivered its assignment of all claims against Lybrand to Dynamark [251 A], which assignment had been specifically excepted from the Poloron-Lybrand settlement, the preamble reading as follows:

> "You have informed us that Poloron may assign to Dynamark Corporation all right which Poloron may have to appeal from the April 3, 1975 order of dismissal, together with any and all right to further pursue its claim for damages as set forth in the Amended Complaint."

---

* Initially, Lybrand moved to dismiss the complaint under Rule 11, Fed.R.Civ. P., claiming, inter alia, that it was sham and false. After that motion and Lybrand's motion for reargument were denied, Lybrand answered and filed counterclaims and third-party claims against the Levitts, Dynamark, their attorney George Feiwell, and Poloron-Indiana. In these pleadings, Lybrand sought damages for alleged malicious prosecution. A series of motion followed in which each party

The release further provides: [247 A]

> "1. Poloron and Poloron Indiana hereby release Lybrand from any and all claims for actual or exemplary damages which they may have against Lybrand, except that this release shall not affect or impair the validity of the above-mentioned assignment by Poloron or the above-described claim being assigned to the extent it is validly assigned to Dynamark Corporation." [247-48A] [Emphasis supplied]

Simultaneous with the delivery of the release by Poloron to Lybrand, Howard L. Weinrich, Esq., a member of Poloron's general counsel, delivered a letter to Lybrand's counsel which states, in relevant part, as follows:

> "Confirming our earlier understanding with respect to the agreement, you have acknowledged that in the event of an assignment of Poloron's claim to Dynamark as contemplated under the agreement, there may not be sufficient time prior to the time in which an appeal by plaintiff may be noticed in which to obtain a substitution of parties. Accordingly, you have recognized that it may be necessary in the case of such an assignment for Dynamark to pursue the appeal in Poloron's name. If such be the case, however, Poloron will use its best efforts to promptly obtain a substitution of parties substituting Dynamark as plaintiff for Poloron." [252 A]

---

* footnote continued --

sought the dismissal of the other's claims. In Judge Connor's narrow ruling, he reached few of the issues. He dismissed the complaint under Rule 41 and did not consider any other ground asserted by Lybrand for its dismissal. He then found no independent basis for federal jurisdiction over Lybrand's counterclaims and cross-claims and dismissed them without considering any basis asserted for their dismissal. He did, however, deny Lybrand's claim for attorney's fees, holding that "Lybrand has not satisfactorily shown that Poloron's behavior was vexatious or in bad faith." [239 A]

DISPOSITION IN THE COURT BELOW

The District Court granted Lybrand's motion to dismiss pursuant to the "two dismissal" rule. In reaching its determination, the District Court held that the dismissal by stipulation of the parties without prejudice, followed by the dismissal by notice of the plaintiff, operates as an adjudication on the merits. In addition, the District Court held that although Dynamark was the plaintiff in the Indiana-New York lawsuit, and Poloron was the plaintiff in the Illinois lawsuit, Dynamark was the real party in interest in both those lawsuits and in the present action, by virtue of its right to a seventy five percent share in any recovery against Lybrand. Thus, the Court concluded that Poloron was a plaintiff which had twice dismissed and that therefore the claim was extinguished by operation of Rule 41(a)(1).

POINT I

THE STIPULATION OF DISCONTINUANCE WAS NOT A FIRST DISMISSAL UNDER THE "TWO DISMISSAL" RULE

The first dismissal occurred by stipulation, signed by all parties. Voluntary dismissal by the plaintiff alone would have been impossible since Lybrand had filed an answer.

Thus, the first suit against Lybrand was not unilaterally dismissed by the plaintiff -- as required by the "two dismissal" rule -- but by consent of the parties. In discussing the "two dismissal" rule, Professor Moore has observed that prior to the adoption of the Federal Rules of Civil Procedure, a voluntary dismissal would never bar the bringing of another suit on the same cause of action. However, Professor Moore observes that Rule 41(a)(1) contains an "important exception" to that general rule -- "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . ." 5 Moore, Federal Practice, ¶41.04, page 1045.

In addressing the issue which is the subject of this appeal, Professor Moore states as follows:

> "A question remains, however, as to whether a dismissal by notice following a dismissal by stipulation bars another action. It would seem that the exception should not apply in this situation." [Id., page 1047]

Professor Moore is therefore of the opinion that the facts of the present case, i.e., a stipulation of discontinuance followed by a unilateral dismissal, should not act as a final adjudication on the merits. Rather, according to Professor Moore, the general rule, that a voluntary dismissal never provides a bar to a subsequent action, should apply.

Professor Moore explains the reasoning for that observation as follows:

> "The general purpose of the two-dismissal rule is to prevent an unreasonable use of dismissal by the plaintiff . . . . It is, therefore, arguable that the two-dismissal rule does not come into play where the defendant has given his consent by stipulation to the first dismissal; and that this stipulation should be distinguished from the situation where the first dismissal was by unilateral action of the plaintiff followed by a second dismissal on notice." [Id., page 1047, fn. 16]

The lower court seems to have misread Professor Moore's analysis. Attempting to follow him, the District Court concluded that Professor Moore "apparently recognized that the rule literally applies in the present circumstances." [235 A]

Professor Moore's rationale is consistent with the policy embodied by Rule 41(a)(1) -- to prevent the institution of a multiplicity of suits against the same defendant which are withdrawn by the unilateral action of the plaintiff for the purpose of harassing the defendant. See, Smith, Kline, & French Laboratories v. A.H. Robins Co., 61 F.R.D. 24, 30 (E.D. Pa. 1973). It is well recognized that dismissal by notice by the plaintiff and dismissal by stipulation of the parties are "separate and distinct methods of voluntarily dismissing a

suit." American Cyanamid v. McGhee, 317 F.2d 295, 297 (5th Cir. 1963). As Judge Rifkind observed in Cornell v. Chase Brass & Copper Co., 48 F. Supp. 979, 981 (S.D.N.Y. 1943), aff'd, 142 F.2d 157 (2d Cir. 1944):

> "That rule distinguishes between dismissals by notice and dismissals by stipulation."

The "two dismissal" rule could not be clearer in providing that a notice of dismissal has a res judicata effect "when filed by a plaintiff who has once dismissed . . . ." [Emphasis supplied] Obviously, the dismissal of the first lawsuit was not a dismissal by the plaintiff, but by all of the parties. In failing to recognize the distinction embodied in Rule 41 between a stipulation of dismissal and a dismissal by notice, the District Court committed error.

The District Court's comment that "[t]he rule makes no distinction as to how the prior dismissal was effected, so long as the plaintiff was responsible for it," [234 A] is also inconsistent with the purpose of the "two dismissal" rule -- "to prevent an unreasonable use of dismissal," (5 Moore's Federal Practice, ¶41.04, page 1045, and cases cited in footnote 7], and conflicts with the general principle that the Federal Rules of Civil Procedure are designed to promote trials on the merits, rather than summary

disposition of cases involving complex issues. See, e.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962).

Accordingly, the lower court erred in its holding that Rule 41(a)(1) has extinguished plaintiff's rights in this action.

POINT II

THE PLAINTIFF HAS NOT TWICE DISMISSED LAWSUITS AGAINST LYBRAND

Rule 41(a)(1) provides that "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action." [Emphasis supplied]

But Poloron was not the plaintiff in the first lawsuit; Dynamark was. Indeed, in that action Poloron was named as a defendant pursuant to leave to amend granted by Judge Metzner after the case had been transferred from Indiana to New York. The action was discontinued by stipulation before Poloron ever answered or asserted any claims against Lybrand or anyone else. Neither did Poloron's subsidiary, Poloron-Indiana, the original defendant in that suit, assert any claims against Lybrand.

Since Poloron, the plaintiff in the second (Illinois) lawsuit (which was dismissed by notice), was not the plaintiff in the first lawsuit of which Lybrand complains (which was dismissed by stipulation), Poloron was not "a plaintiff who has once dismissed . . . an action." Accordingly, the "two dismissal" rule does not apply.

While acknowledging these undisputed facts, the District Court held that Poloron was only the "nominal plaintiff." [236 A] The Court found that "Dynamark, by virtue of its seventy five percent share in any recovery, is and was the real party in interest in all three actions. [236-37 A] That determination is simply incorrect.

In Fairchild Hiller Corporation v. McDonnell Douglas Corporation, 28 N.Y.2d 325, 321 N.Y.S.2d 857 (1971), where the relevant facts were remarkably similar to those in the present case, the court was called upon, in a different context, to determine "real party in interest" contentions. There, certain assets of Republic Aviation Corporation ("Republic"), had been acquired by Fairchild Hiller Corporation ("Fairchild"), and the remaining assets had been acquired by another company ("Farmingdale"). Previous thereto, Republic and McDonnell had entered into an agreement for the manufacture of aircraft assemblies, and a dispute arose between them. In connection

with the subsequent acquisition by Fairchild, Fairchild and Farmingdale entered into a separate agreement which provided that seventy five percent of any recovery obtained by Fairchild in connection with the claim against McDonnell would be turned over to Farmingdale. That agreement also provided that Fairchild would have exclusive control over any proceedings on Republic's claim, just as the settlement agreement between Dynamark and Poloron provided that "[C]ontrol over the conduct of the litigation shall be maintained solely by [Poloron]." Also, both in Fairchild and in the present case, the named plaintiff is entitled to only twenty-five percent of the recovery. [186-87 A]

In rejecting the contention that Fairchild was only the nominal plaintiff, the New York Court of Appeals stated:

> "Moreover, the sharing agreement between Fairchild and Farmingdale makes it abundantly clear that title to the cause of action, as well as control over the claim with respect to litigation or settlement, resides with Fairchild. Thus, regardless of the use to be made of any proceeds collected, pursuant to the sharing agreement, Fairchild, the assignee, is the real party in interest. (Sprung v. Jaffe, supra, at p. 545, 168 N.Y.S.2d at p. 461, 147 N.E.2d at p. 9; Spencer v. Standard Chem. & Metals Corp., 237 N.Y. 479, 480-481, 143 N.E. 651, 652; Sheridan v. Mayor of New York, 68 N.Y. 30; Allen v. Brown, 44 N.Y. 228; Cummings v. Morris, 25 N.Y. 625.)" [Id., 28 N.Y.2d at 330-331, 321 N.Y.S.2d at 861]

Since Dynamark was not the real party in interest in both of the previously dismissed lawsuits, Poloron was not a plaintiff which had "once dismissed" and therefore, the "two dismissal" rule should not have been applied to extinguish the claim.

POINT III

THE ASSIGNMENT TO DYNAMARK OF POLORON'S CLAIM AGAINST LYBRAND DOES NOT RENDER THIS APPEAL MOOT

As observed above, the Court has directed that the parties discuss in their appeal briefs the issues raised in Lybrand's motion to dismiss this appeal, and Dynamark's motion to be substituted as plaintiff-appellant, decision of which have been reserved.

Lybrand offers three grounds for dismissing this appeal as being moot:

(a) Poloron and Lybrand have settled their disputes and have exchanged mutual releases;

(b) While the release given to Lybrand contemplated that Poloron's claim would survive the release if it were validly assigned to Dynamark, no assignment occurred prior to the expiration of the time the notice of appeal was filed;

(c) The assignment of the claim of Poloron to Dynamark is champertous and, therefore, invalid.

These assertions are completely without merit.

The purported release to Lybrand by Poloron, which was drafted by Lybrand, contains a preamble which states:

> "Poloron may assign to Dynamark Corporation all right which Poloron may have to appeal from the April 3, 1975 order of dismissal, together with any and all right to further pursue its claim for damages as set forth in the Amended Complaint."

Therefore, in clear language, which expressly contradicts Lybrand's arguments, the purported releases provide as follows:

> "1. Poloron and Poloron Indiana hereby release Lybrand from any and all claims for actual or exemplary damages which they may have against Lybrand, except that this release shall not affect or impair the validity of the above-mentioned assignment by Poloron or the above-described claim being assigned to the extent it is validly assigned to Dynamark Corporation." [Emphasis supplied]

Thus, the agreement expressly contemplated that the claims asserted in the amended complaint and the right to appeal from the decision below would survive the release, unless the subsequent assignment to Dynamark were otherwise invalid, which it is not. Indeed, the April 23, 1975, letter to Lybrand's counsel confirms that it was never intended that the settlement

between Lybrand and Poloron would release the claims asserted in this action which have been assigned to Dynamark. It is also clear, as the following portion of that letter demonstrates, that the notice of appeal could properly be filed by Poloron.

> "Confirming our earlier understanding with respect to the agreement, you have acknowledged that in the event of an assignment of Poloron's claim to Dynamark as contemplated under the agreement, there may not be sufficient time prior to the time in which an appeal by plaintiff may be noticed in which to obtain a substitution of parties. Accordingly, you have recognized that it may be necessary in the case of such an assignment for Dynamark to pursue the appeal in Poloron's name. If such be the case, however, Poloron will use its best efforts to promptly obtain a substitution of parties substituting Dynamark as plaintiff for Poloron."

Similarly, since the claims survived and were validly assigned to Dynamark, the fact that the assignment did not occur until after Poloron exercised its surviving right to appeal is of no moment.

Lybrand also contends that the assignment to Dynamark of the claims contained in the amended complaint is invalid because it violates Section 489 of the New York Judiciary Law. That section prohibits an assignment of a claim "with the intent and for the purpose" of bringing an action thereon. In commenting on the exact same language in a statutory predecessor

to Section 489, the Court of Appeals stated in Moses v. McDivitt, 88 N.Y. 63, 65 (1882):

> "This language is significant and indicates that a mere intent to bring a suit on a claim purchased does not constitute the offense; the purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose."

The assignment of the claims asserted in the amended complaint to Dynamark was perfectly proper and lawful. As discussed above, Dynamark and Poloron had been engaged in protracted litigation concerning their respective rights arising out of the sale of a corporation, LMC, to Poloron. The parties learned from an examination conducted by Touche, Ross, a reputable accounting firm, that the real cause of their dispute was the incompetent audit conducted by Lybrand. Since it became apparent that neither party was a wrongdoer, the only responsible approach was to terminate the lawsuit and proceed against Lybrand. In connection with the settlement of that lawsuit, Dynamark and its principals assigned their claim against Lybrand to Poloron to litigate against Lybrand. Now, Poloron has decided that it no longer wishes to be involved in litigation, and pursuant to its original settlement agreement with Dynamark, the entire claim against Lybrand has been assigned to Dynamark. The purpose of this assignment was not to create new litigation;

it was to permit the pending action to continue with a different plaintiff. See, Sprung v. Jaffee, 3 N.Y.2d 539, 169 N.Y.S. 2d 456 (1957).

As the court made clear in Moses v. McDivitt, supra, 88 N.Y. at 65-66:

> "The object of the statute . . . was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right of the assignee." [Emphasis supplied]

Accord, Fairchild Hiller Corporation v. McDonnell Douglas Corporation, 28 N.Y.2d 325, 329, 330, 321 N.Y.S.2d 857, 860 (1971), where the court stated:

> "We have consistently held that in order to fall within the statutory prohibition, the assignment must be made for the very purpose of bringing suit and this implies an exclusion of any other purpose."

Here, the purpose was to protect the original claim against Lybrand arising out of its misconduct which had damaged Dynamark as well as Poloron.

CONCLUSION

The motion to dismiss this appeal should be denied, the motion to substitute Dynamark as plaintiff-appellant should be granted, and the order of the District Court which dismissed

the amended complaint should be reversed.

Dated: New York, New York
June 17, 1975

GOLD, FARRELL & MARKS
Attorneys for Plaintiff-Appellant

Of Counsel:

Martin R. Gold
Charles B. Ortner

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DOUGLAS NORDLINGER, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 601 Woodmere Boulevard, Woodmere, New York 11598. That on July 10, 1975, deponent served two copies of the within Brief for Plaintiff-Appellant upon.

Hughes, Hubbard & Reed
Attorneys for Defendant and Third-
Party Plaintiff-Appellee
One Wall Street
New York, New York 10005

Boteen, Hays, Sklar & Herzberg
Attorneys for Third-Party Defendant
Poloron Products of Indiana, Inc.
200 Park Avenue
New York, New YOrk 10017

by depositing true copies of same enclosed in post-paid properly addressed wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Douglas Nordlinger
DOUGLAS NORDLINGER

Sworn to before me this
10th day of July, 1975.

Judith S. Hodes

JUDITH S. HODES
Notary Public, State of New York
4817227 - Qual. in Queens Co.
Commission Expires March 30, 1976